

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of:

Amendments of Rules Governing
Procedures to be Followed When
Formal Complaints Are Filed Against
Common Carriers

CC Docket No. 92-26

**COMMENTS OF ALLNET COMMUNICATION SERVICES ON
PROPOSED RULE CHANGES**

Allnet Communication Services, Inc. (Allnet) submits these comments on the Commission's proposal to revise its formal complaint rules and regulations in order to promote more efficient use of Commission resources and reduce the ever-growing backlog of formal complaints. Allnet welcomes the proposed changes. Although the rule changes will have little effect on the current backlog of over 1000 formal complaints, they will reduce some of the inefficiencies that exist in the current procedures that would have slowed down the processing of complaints that will be filed in the future. Except for clarification of some points and the one or two additional changes, Allnet supports the proposed reforms. The Commission should institute the proposed changes without any further delay.

I. The Complaint Process Requires Changes

The Commission has done a very good job of analyzing the strengths and weaknesses of the existing formal complaint procedural rules. The existing rules contain a number of elements whose benefits are not outweighed by the

opportunities for the delays they often create. One example of these flaws is the almost routine procedure of defendant's filing Motions to Dismiss. The routinely filed Motions to Dismiss are often filed for the sole purpose of providing the Defendant with the last word in the initial briefing of the complaint. The proposed rules would eliminate the reply round on such motions, as it would similarly do for replies to answers (but not affirmative defenses) by complainants. These changes, alone, would eliminate much of the unnecessary briefing that currently takes place under the existing regime.

Similarly, changes are proposed for the discovery process. Among the more significant changes would be the elimination of the "relevance" defense for discovery requests. However, some of these changes were not explicitly set forth in the proposed text of the rules. Thus, appropriate modifications are proposed.

III. Section by Section Analysis

Attachment A, herein, sets forth a section-by-section analysis of the proposed rules sets forth any changes and their respective reasons.

Respectfully submitted,
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ATTACHMENT A

SECTION-BY-SECTION ANALYSIS¹

¹Proposed modifications to proposed rules are marked by underlining, while proposed deletions to proposed rules are marked by overstriking.

Section 1.720 General pleading requirements.

* * *

(i) All statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.

(j) All documents, or relevant portions thereof, that are cited in any pleading (complaints, answers, motions, etc), but are not already on file with the Commission, must be attached to the pleading that cites such documents or portions of such documents. No party may rely upon a document it files at its own discretion later in the proceeding as support for an allegation, denial, or assertion of fact previously set forth in its pleadings, except where good cause is shown as to why the party could not have failed produced such document as an attachment to its earlier filed pleading which initially set forth such allegation, denial, or assertion of fact.

Reasons for Proposed Changes:

If parties were to file complete documentation along with their initial pleadings, much of the need for discovery would be eliminated. Carrier-defendant's tend to "sandbag" documents supporting their assertions. Only through discovery does the existence of such documents become known. In addition, by placing as much evidence in the record as soon as possible, the parties may be more amenable to settling the case as each sees the full substantiation of the facts set forth by the other. By placing the burden on the party asserting a fact to produce all documents it intends to use to support its assertions of fact, later discovery requirements will be significantly reduced.

Section 1.721 Format, Content, Filing and Service Requirements

* * *

(c) A party may, at its discretion, serve a stamped copy of its complaint on the defendant, indicating on such copy the file number assigned by the Commission for such complaint. Upon service of the stamped copy of the complaint, the complainant shall file a statement with the Commission indicating that such service has occurred.

Reasons for Proposed Changes:

Much of the existing delay takes place between the time that the complaint is filed with the Commission and the time the Commission, in turn, serves the defendant. This period can be as long as 30 to 60 days. By allowing self-service, using a file number obtained from the Commission, service could take place much sooner -- allowing the clock to start running much sooner for an initial answer. The Commission staff would be required to institute a simple procedure to allow complainants to obtain a file number on the date of filing of the complaint.

Section 1.724 Answers.

(a) Any carrier upon which a copy of a formal complaint, supplemental complaint, amended complaint or cross complaint is served under this subpart shall answer within 20 days of service of the pleading to which the answer is made, unless otherwise directed by the Commission.

* * *

Reasons for Proposed Changes:

Allnet supports the changes set forth by the Commission. With the proposed changes set forth Section 1.721, service would be service by the plaintiff, or the Commission (in the case where the plaintiff has not used the self-service option).

Section 1.726 Replies.

Within 10 days after service of an answer containing affirmative defenses ~~that are factually different from any denials also contained therein~~, a complainant may file and serve a reply which shall be responsive to only those allegations contained in affirmative defenses. Failure to reply will be deemed an admission of such allegations.

Reasons for Proposed Changes:

Allnet believes that a complainant should be provided the opportunity to respond to any affirmative defenses. The distinction that the Commission attempts to set forth -- namely, ones which are "factually different" from those that are not -- is unclear. It will create more confusion and dispute than would be present if the distinction were not made at all. Particularly in light of the Commission's statement that "failure to reply will be deemed an admission of such allegations," the Commission's proposed rule would, as a practical matter, place the complainant in a position of having to reply to any affirmative defenses in order to avoid a later dispute regarding whether such affirmative defenses were of the type requiring a reply or of the type which are not.

Section 1.727 Motions

[paragraphs (b) and (e) are removed;

paragraphs (c) and (d) are redesignated and republished as paragraphs (e) and (f), respectively; and

new paragraphs (b), (c), (d) and (g) are added to read as follows:]

* * *

(b) Motions shall not be filed before submission of an answer except when a complainant, either by itself or jointly with a defendant, moves for dismissal.

(c) A motion by a defendant that allegations in a complaint be made more definite and certain may be filed with the answer to the complaint which must, nonetheless, respond to those allegations that reasonably can be addressed.

(d) A motion by a defendant for summary judgment or dismissal may be filed with the answer to the complaint. No such motions will be accepted after the deadline for filing an answer unless the motion is based upon information discovered after the pleading deadline and clearly so states, identifying the particular information and the occasion of its discovery.

(e) Where the matter involved in the motion is one of procedure or discovery, the moving party shall provide a proposed order for adoption, which appropriately incorporates the basis therefor.

(f) A party opposing any motion concerning procedure or discovery shall also provide a proposed order for adoption, which appropriately incorporates the basis therefor.

(g) Oppositions to motions may be filed within ten days after the motion is filed. Oppositions shall be limited to the specific issues and allegations contained in the motion; when a motion is incorporated in an answer to a complaint, an opposition to the motion shall not address any issues presented in the answer that are not also specifically raised in the motion.

(h) No reply may be filed to an Opposition to a motion.

(i) When actions involving a common question of law or fact are pending before the Commission, upon motion of any party or upon the Commission's own initiative, the Commission may order that the proceedings, or portions thereof, be consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays.

(j) In furtherance of convenience or to avoid prejudice, or when separate proceedings will be conducive to expedition and economy, the Commission may order a separate proceeding for any claim, cross-claim, counter-claim, or third party claim, or any separate issue, or of any number of cross-claims, counterclaims, third-party claims, or issues.

(k) All parties may join in one action as plaintiffs if they assert any right to relief, severally, or in the alternative in response of or arising out of the same transactions, occurrence, or series or transactions or occurrences and if any question of law or fact common to all these persons will arise in the same action. A complainant need not be interested in obtaining against all the relief demanded. Judgment may be given for one or more of the complainants according to their respective rights to relief.

Reasons for Proposed Changes:

The proposed change explicitly sets forth that no reply may be filed to a motion to dismiss or for a summary judgment.

Additional modifications (i), (j), and (k) provide more efficient treatment of similar and dissimilar issues and proceedings. These are reflective of Rules 42 and 20 of the Federal Rules of Civil Procedure. These particular changes are distinguishable from those requirements already set forth in §1.734(a) of the Commission's rules -- which address the initial filing of the complaint and its final disposition, rather than consolidation of the proceedings or parts of the proceedings.

Section 1.729 Interrogatories to parties.

[paragraph (a) is revised to read as follows;

[paragraphs (b), (c), and (d) are revised to read as follows and redesignated as paragraphs (d), (e), and (g), respectively; and new paragraphs (b), (c), and (f) are added to read as follows:

1.729 Interrogatories to parties.

(a) During the time period beginning with the date an answer to a complaint is due and ending 20 days after such date, any party may serve any other party written interrogatories, to be answered in writing by the party served or, if the party served is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. Parties shall propound no more than 30 single interrogatories without prior Commission approval. Subparts of an interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. All interrogatories served on an opposing party shall be filed with the Commission at the time of service.

(b) Unless otherwise directed by the staff, no discovery pertaining to damages will be authorized until the Commission or its staff has issued a decision on the merits of a complaint or cross-complaint in favor of the complainant.

(c) Any objection to the breadth of an interrogatory shall be made within 10 days after service of the interrogatory. Other objections based on legally recognized grounds (e.g. attorney-client) may be submitted in lieu of an answer.

(d) Parties on whom interrogatories are served shall respond without waiting to be ordered to do so by the Commission. Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be submitted in accordance with subsection (c), above. The answers shall be signed by the person making them. The party on whom the interrogatories were served shall serve a copy of the answers and objections, if any, within 20 days after service of the interrogatories. ~~Failure to answer or an evasive answer will be deemed an admission for purposes of resolving the complaint.~~

(e) Where the responding party has failed to respond, or has objected, to any interrogatory, the party propounding the interrogatories may, within ~~5~~ 10 days of the date the response was due if no response is filed or the date of service of the objection, move to compel a response

thereto.

(f) Objections will be resolved by Commission staff at a status conference. Such rulings will be promptly memorialized in writing and served on the parties. In the event an objection is overruled by the Commission staff, the respondent shall serve the requested materials on the movant within 10 days from the date of service of the writting memorializing the Commission staff rulings the status conference or within 20 days after service of the interrogatories, whichever period is longer.

(g) Answers to interrogatories designated as proprietary by a party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act, 5 U.S.C. @ 552(b) (1) (9) shall not be filed with the Commission unless so ordered by the Commission or its staff.

Section 1.730 Other forms of discovery

[paragraph (c) is revised to read as follows and paragraph (d) is added to read as follows:]

* * *

(c) Motions seeking discovery beyond the 30 single interrogatories permitted under @ 1.729 may be filed during the period beginning with the date an answer to a complaint is due and ending 20 days after such date, except where the movant demonstrates that the need for such discovery could not, even with due diligence, have been ascertained within this period.

~~(d) Documents produced through discovery shall not be filed with the Commission unless so ordered by the Commission or its staff.~~

[Sections 1.731 through 1.734 are redesignated as @@ 1.732 through 1.735]

Reasons for Proposed Changes:

Interrogatories are typically questions. Thus, it makes no sense for a failure to answer to serve as an admission. Subsection (d) is changed to reflect this fact. [Nothing in the federal rules would be consistent with the Commission's proposed treatment of failures to answer interrogatories].

Given that there may be a disagreement between parties as to what the staff decided in the status conference, the party responding to the interrogatory should not be required to file a response until the written order of the Commission staff is issued which details the staff's determination.

All answers to interrogatories should be placed in the record in the proceeding -- except for those subject to confidentiality concerns under Exemption 4. This modification would assure that the staff has access to as much information as is available without compromising the Commission's goal of eliminating (or reducing) FOIA confidentiality complexities. In addition, by placing as much information and documents in the record, complainants in similar actions could rely upon this previously filed information -- thus eliminating redundant discovery requests of the same defendants by different complainants. It would also allow defendants to rely upon responses to discovery previously filed with the Commission -- thus, reducing the amount of effort required in responding to discovery requests

1.731 Confidentiality of information produced through discovery.

(a) Any materials generated or provided by a party in response to discovery may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act, 5 U.S.C. @ 552(b) (1) (9). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed.

(b) Materials marked as proprietary may be disclosed solely to the following parties, only for use in prosecuting or defending a party in the case, and only to the extent necessary to assist in the prosecution or defense of the complaint action:

- (1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;
- (2) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;
- (3) Consultants or expert witnesses retained by the parties;
- (4) The Commission and its staff;
- (5) Court reporters and stenographers in accordance with the terms and conditions of this section; and
- (6) Persons employed by the party or third party that generated the material designated as proprietary.

These individuals shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information shall sign a notarized statement affirmatively stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(c) No copies of materials marked proprietary may be made except working copies to be used by persons designated in subsection (b), above. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(d) Upon final termination of a formal complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log of persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

Reasons for Proposed Changes:

The proposed rules did not clearly limit the individuals within the receiving party who would be allowed view the discovery responses and the purposes to which such information could be placed. The proposed changes would reflect these limitations. Allnet also recommends that the Commission set forth in its rules a sample non-disclosure agreement to eliminate endless negotiations over the contents of such agreements.

1.732 Other required written submissions.

[1.732, paragraph (b) is redesignated and republished as paragraph (f);

and new paragraphs (b), (c), (d), and (e) are added to read as follows:]

* * *

(b) In cases where discovery is not conducted, briefs shall be filed concurrently by both complainant and defendant within 15 days from the date the Commission or its staff orders submission of such a pleading. If the Commission staff fails to issue such order, the initial briefs shall be due within 180 days of the filing date of the original complaint. Briefs shall be no longer than 25 pages, unless otherwise ordered.

(c) In cases where discovery is conducted, initial briefs shall be filed concurrently by both complainant and defendant within 20 days from the date the Commission or its staff orders submission of such a pleading. If the Commission staff fails to issue such order, the initial briefs shall be due within 180 days of the filing date of the original complaint. Initial briefs shall be no longer than 35 pages, unless otherwise ordered.

(d) Reply briefs may be filed only in cases where discovery is conducted. Reply briefs may be submitted by either party within 10 days from the filing deadline for initial briefs. Reply briefs shall be no longer than 20 pages, unless otherwise ordered.

(e) Briefs containing information which is claimed by an opposing or third party to be proprietary under @ 1.731 shall be submitted to the Commission in confidence pursuant to the requirements of Section 0.459 and clearly marked "Not for Public Inspection." An edited version removing all references to proprietary data shall also be filed with the Commission for inclusion in the public file.

(f) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including affidavits and exhibits.

Reasons for Proposed Changes:

A default filing schedule for initial briefs is added to eliminate the need for staff to issue orders directing the filing of initial briefs. The proposed schedule will also assure that the Commission has adequate time for issuing a decision within the statutory period required in 47 USC §208(b): 12 months and 15 months.

1.733 Status conference.

[In newly redesignated §1.733, paragraph (a) introductory text is republished; paragraphs (a) (5) and (b) are revised to read as follows; paragraphs (c) and (d) are redesignated and republished as paragraphs (d) and (e), respectively; and new paragraph (c) is added to read as follows:]

(a) In any complaint proceeding, the Commission may in its discretion direct the attorneys and/or the parties to appear before it for a conference to consider:

* * *

(5) The necessity and extent of discovery, including objections to interrogatories or requests for production of documents;

* * *

(b) While a conference normally will be scheduled after the answer has been filed, any party may request that a conference be held at any time after the complaint has been filed.

(c) During a status conference the staff may issue rulings pertaining to a variety of interlocutory matters relevant to the conduct of a formal complaint proceeding including, inter alia, procedural motions, discovery, and the submission of briefs or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. ~~However, all rulings are effective immediately upon issuance at the conference.~~

(d) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.

(e) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver and will not prevent the Commission from conferring with those parties or counsel present.

Reasons for Proposed Changes:

The only change would require that rulings of the staff not be effective until memorialized in writing. As noted earlier, verbal rulings without a Court reporter will be subject to interpretation and memory lapses of one or both parties. In order to avoid unnecessary controversy, it would be best to wait for a written ruling by the staff.

1.735 Copies; service; separate filings against multiple defendants.

* * *

(b) The complainant must file an original plus three copies of the complaint, accompanied by the correct fee, in accordance with Subpart G of this Part of the Rules. See 47 C.F.R. @ 1.1105(1)(c). However, if a complaint is addressed against multiple defendants, complainant shall pay separate fee and supply three additional copies of the complaint for each additional defendant.

Reasons for Proposed Changes:

No changes proposed.